

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

RAGHUBIR SINGH,

Defendant and Appellant.

C085134

(Super. Ct. No.
STK-CR-FE-2016-0013795)

Defendant Raghubir Singh appeals his convictions for elder abuse and battery with serious bodily injury, with true findings on enhancement allegations as to both counts that he caused great bodily injury to a victim over the age of 70. He claims (1) the trial court erred in instructing the jury regarding the corpus delicti rule, thereby lowering the prosecution's burden of proof; (2) trial counsel was ineffective for failing to request a jury instruction on third party culpability; and (3) the cumulative effect of the errors was prejudicial.

In supplemental briefing, defendant argues that the great bodily injury enhancement was an unauthorized sentence on his conviction for battery with serious bodily injury, as great bodily injury is an element of the substantive offense. The People concede that the trial court imposed an unauthorized sentence, and also argue that we must correct the presentence custody credits.

We will affirm the convictions and remand the matter to the trial court for resentencing.

BACKGROUND

While Pooja T. and her family were out of the country, her mother, Resham K. was housesitting and caring for the family dog. Defendant, who is Resham's son and Pooja's brother, was also staying at the house while Pooja was away. One night, neighbors called police after hearing noise and yelling coming from the garage of the home.

Neighbor Insaf A. saw a man hitting and kicking an "elderly lady" who was on the ground. The woman was defendant's mother, Resham. As the man hit the woman, Insaf heard him say, "I'm going to kill you." Insaf also saw the man hitting the dog and heard him threaten to kill it. He thought the man was drunk.

Neighbor Amrik S. lived across the street from Pooja and was familiar with defendant and recognized him as a regular visitor to Pooja's home. He heard loud noises in the garage and saw defendant there, beating the dog. He thought defendant was drunk. Defendant was yelling and using "abusive" words, calling everyone in the neighborhood "motherfuckers." Both Insaf and Amrik saw the man who was hitting the woman, defendant, get into a black Mercedes and move it to the other side of the garage.

When officers arrived at the scene, they saw the black Mercedes in the garage and defendant pacing in front of it. They tried to get his attention and asked him to come towards them, but defendant instead got into the car. Officer Nariya Jean of the Stockton Police Department approached the driver's side of the vehicle and saw Resham lying on

the floor of the garage in a pool of blood in front of the vehicle. Officer Jean and his partner pulled defendant out of the car and arrested him. Officer Jean did not inspect defendant's hands for injuries, but noted he had blood on the palms of his hands. Insaf told Officer Jean they had arrested the correct person, the one who had beaten Resham.

After police arrested defendant, Amrik went across the street and saw Resham unconscious on the garage floor with blood everywhere. She was unresponsive as medics tried to treat her. At the request of the medics, Amrik traveled with them to the hospital to act as a translator. The medics asked Resham what had happened, and she answered through the translator that defendant had beaten her with punches.

Dr. Keith Hughes treated Resham in the emergency room. She sustained blunt head trauma, a subdural hematoma, broken nose, and broken jaw. Two days after the beating, Pooja visited her mother in the hospital and Resham did not recognize her. Resham could not speak or hear properly. She was hospitalized for five days, and remained in a nursing home for approximately 22 days. While in the nursing home, she also could not walk.

At the preliminary hearing, Resham testified defendant had slapped her on the head, punched her on the cheek, and hit and kicked her in the leg. He had hit her because he was drunk and had made a mistake.

At trial, Resham denied testifying at the preliminary hearing that defendant had been drunk, slapped and punched her in the face, and kicked her in the leg. She also claimed she had blamed defendant for beating her because, as a result of her head injury, she "was not okay" and mistakenly thought it had been defendant. She testified at trial that she opened the garage door and saw men beating her son. She started to say something to them, and they beat her. She lost consciousness and fell down. The next thing she remembered was hearing the police officers arriving. She also denied telling Amrik that defendant had beaten her and insisted it was "the boys" who lived next door who had hurt her.

There was a rental property across the street from Insaf's home in which a number of Punjabi men lived. The men who rented that home were outside when defendant was arrested. These were the men Resham referred to as the "boys" who beat her.

A jury convicted defendant of elder abuse (Pen. Code, § 368, subd. (b)(1)—count 1)¹ and battery with serious bodily injury (§ 243, subd. (d)—count 2), and found true the enhancement allegation as to both counts that the offense resulted in great bodily injury to an elderly victim (§ 12022.7, subd. (c)). The court sentenced defendant to an aggregate term of seven years in prison, consisting of two years for battery with serious bodily injury, with an additional consecutive five years for the great bodily injury enhancement, and two years for elder abuse, with an additional consecutive five years for the great bodily injury enhancement, stayed under section 654. The trial court awarded defendant 456 days of presentence custody credit. The trial court also ordered defendant to pay various fines and fees.

DISCUSSION

I

Corpus Delicti Instruction

Defendant contends the trial court prejudicially erred in instructing the jury with CALCRIM No. 359, the corpus delicti instruction.² He argues the instruction confused the jury and lowered the prosecution's burden of proof. He claims in the absence of this error, he likely would not have been convicted.

¹ Undesignated statutory references are to the Penal Code.

² The corpus delicti rule rests on the principle that the prosecution cannot prove the body of the crime, "i.e., the fact of injury, loss, or harm and the existence of a criminal agency as its cause," by exclusive reliance on the defendant's extrajudicial statements. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169 (*Alvarez*).)

Background

During a predeliberation instruction conference, the court and the parties discussed the propriety of instructing the jury with CALCRIM No. 358,³ the cautionary instruction regarding statements made by the defendant, and CALCRIM No. 359, the corpus delicti instruction. The prosecution argued Amrik’s testimony that defendant cursed at the neighbors and used abusive language warranted the instructions. Defense counsel objected to the corpus delicti instruction, arguing the statements at issue did not justify the instruction. Defense counsel also argued the instruction “watered down” the People’s burden of proof. Finally, counsel argued that defendant’s statement of cursing at the neighbors was not a corpus delicti statement because it did not go to the charge of elder abuse. The prosecution ultimately withdrew its request for CALCRIM No. 359. However, relying upon *People v. Diaz* (2015) 60 Cal.4th 1176, which involves statements entitled to the cautionary instruction of CALCRIM No. 358, the trial court found that it also was required to give the corpus delicti instruction.⁴

³ As given, CALCRIM No. 358 read: “You have heard evidence that the defendant made oral or written statements before the trial. You must decide whether the defendant made any such statements in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements. [¶] Consider with caution any statement made by the defendant tending to show his guilt, unless the statement was written or otherwise recorded.”

⁴ As given, CALCRIM No. 359 read: “The defendant may not be convicted of any crime based on his out-of-court statements alone. You may rely on the defendant’s out-of-court statements to convict him only if you first conclude that other evidence shows that the charged crime was committed. [¶] That ‘other’ evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. This requirement of ‘other evidence’ does not apply to proving the identity of the person who committed the crime. [¶] If other evidence shows that the charged crime was committed, the identity of the person may be proved by the defendant’s statement alone. You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt.”

The trial court also instructed the jury several times that the prosecution was required to prove defendant's guilt beyond a reasonable doubt. (CALCRIM Nos. 103, 220, 224, 315, 3162.)

Analysis

“ ‘It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions.’ [Citation.] When a defendant claims an instruction was subject to erroneous interpretation by the jury, he must demonstrate a reasonable likelihood that the jury misconstrued or misapplied the instruction in the manner asserted. [Citation.] In determining the correctness of jury instructions, we consider the entire charge of the court, in light of the trial record. [Citation.]” (*People v. Covarrubias* (2016) 1 Cal.5th 838, 926.)

As given, CALCRIM No. 359 correctly sets forth the corpus delicti rule, instructing the jury it cannot base a conviction on a defendant's out-of-court statement alone. (*People v. Ledesma* (2006) 39 Cal.4th 641, 721.) Rather, the prosecution must prove a crime actually occurred apart from any of defendant's out-of-court statements. (*Alvarez, supra*, 27 Cal.4th at pp. 1168-1169.) “The independent proof [of the corpus delicti] may be circumstantial and need not be beyond a reasonable doubt.” (*Id.* at p. 1171.) “In every case, once the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues. [Citations.]” (*Ibid.*)

It is error to give an instruction that correctly states a principle of law but has no application to the facts of the case. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) However, if this is the only error, it is one of state law subject to the test articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Guiton, supra*, at pp. 1129-1130.) “[S]uch an error is usually harmless, having little or no effect ‘other than to add to the bulk of the charge.’ [Citation.] There is ground for concern only when an abstract or irrelevant instruction creates a substantial risk of misleading the jury to the defendant's

prejudice.” (*People v. Rollo* (1977) 20 Cal.3d 109, 123, superseded by constitutional amendment on another ground as stated in *People v. Castro* (1985) 38 Cal.3d 301, 307-308.) To determine whether the corpus delicti instruction misled or confused the jury, we consider whether there was any reasonable likelihood the jury would have misunderstood the instruction. (*People v. Foster* (2010) 50 Cal.4th 1301, 1345.)

The cautionary instruction of CALCRIM No. 358 applies to “any extrajudicial oral statement by the defendant that is used by the prosecution to prove the defendant’s guilt—it does not matter whether the statement was made before, during, or after the crime, whether it can be described as a confession or admission, or whether it is a verbal act that constitutes part of the crime or the criminal act itself.” (*People v. Diaz, supra*, 60 Cal.4th at p. 1187.) The cautionary instruction “ ‘is designed to aid the jury in determining whether an admission or confession was in fact made.’ ” (*Id.* at p. 1185.) By contrast, the corpus delicti rule of CALCRIM No. 359 applies to inculpatory extrajudicial statements, such as confessions, admissions, and preoffense statements of intent. (*People v. Rivas* (2013) 214 Cal.App.4th 1410, 1431; *Alvarez, supra*, 27 Cal.4th at pp. 1168-1169; *People v. Carpenter* (1997) 15 Cal.4th 312, 394, abrogated on other grounds by *People v. Diaz, supra*, 60 Cal.4th at pp. 1189-1190.) The corpus delicti rule “does not extend to statements made during the commission of the charged crime.” (*People v. Chan* (2005) 128 Cal.App.4th 408, 420.)

In relying on *Diaz* and finding that defendant’s statements calling his neighbors names warranted both instructions, the trial court appears to have conflated the type of statements that require the cautionary instruction of CALCRIM No. 358 and those that require the corpus delicti instruction of CALCRIM No. 359. Defendant’s statement of cursing at his neighbors was not an inculpatory statement. Nor was it an admission,

confession, or preoffense statement of intent. The People do not argue otherwise.⁵ The trial court thus erred in giving the corpus delicti instruction.

The Error was Harmless

As a threshold matter, we reject defendant's contention that CALCRIM No. 359 lessened the prosecutor's burden of proof. (See *People v. Rivas*, *supra*, 214 Cal.App.4th at p. 1431.) The jury was instructed in at least five separate instructions that it could not convict defendant unless the People had proven his guilt beyond a reasonable doubt. (CALCRIM Nos. 103, 220, 224, 315, 3162.) We presume the jury followed these instructions. (*People v. Smith* (2007) 40 Cal.4th 483, 517.)

Next, we reject defendant's claim the instruction was unduly confusing. CALCRIM No. 359 correctly states the law regarding the distinct concepts of the proof required to establish commission of a crime, as explained in the first two paragraphs of the instruction, and the proof of identity, stated in the third paragraph. "There is no danger a jury will be unable to separate the two rules." (*People v. Rosales* (2014) 222 Cal.App.4th 1254, 1260.) In addition, CALCRIM No. 359 concludes by instructing the jury that the defendant may not be convicted unless the prosecution proves guilt beyond a reasonable doubt. We find there "was no reasonable likelihood the jury was confused and misapplied the instruction." (*Rosales*, at p. 1261.)

Finally, there is no reasonable probability that in the absence of the corpus delicti instruction the jury would not have convicted defendant. Insaf saw defendant beating Resham in the garage. Both Amrik and Insaf saw defendant, the man beating Resham,

⁵ In their argument to this court supporting the corpus delicti instruction, the People refer to another statement to which Insaf testified, i.e., that defendant said during the attack, "I'm going to kill you" and heard him threaten to kill the family dog. These statements, however, were not cited by the trial court as a basis for giving the instruction, nor were they part of the parties' arguments in the trial court. In any event, the corpus delicti rule "does not extend to statements made during the commission of the charged crime." (*People v. Chan*, *supra*, 128 Cal.App.4th at p. 420.)

get in the Mercedes and move the vehicle. That man got back in the car when officers arrived. Insaf told officers they had arrested the right person. Amrik and Insaf also both stated they believed defendant was drunk. While receiving treatment in the ambulance, Resham said defendant, her son, had beaten her. Although she denied it at trial, Resham testified at the preliminary hearing that defendant had punched and kicked her because he was drunk. Given the weight of this evidence, it is unlikely the result of the trial would have been different had the jury not been instructed with CALCRIM No. 359.

II

Ineffective Assistance of Counsel

Defendant contends his trial counsel was ineffective in failing to request an instruction on third party culpability. He claims that because his defense was premised on the idea that neighbors assaulted Resham, a reasonably competent attorney would have sought a pinpoint instruction. He argues that such an instruction would have focused the jury on the issue of third party culpability and whether the prosecution had proven beyond a reasonable doubt that it was defendant, not the neighbors, who committed the crime.

There is no CALCRIM instruction on third party culpability, but defendant offers an example of what such an instruction might include. This proposed instruction provides that defendant is not required to prove another person's guilt; that the prosecution has the burden of proving guilt beyond a reasonable doubt, otherwise defendant is entitled to an acquittal; that the weight and significance of evidence of a third party's guilt are for the jury to determine; and, if after considering all the evidence, the jury has a reasonable doubt as to defendant's guilt, it must find him not guilty.

To establish a claim of ineffective assistance of counsel, the defendant must show by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms, and (2) it is reasonably probable the defendant would have obtained a more favorable result absent the deficiency. (*Strickland v. Washington* (1984))

466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693-694, 696].) If a defendant fails to establish either component, the ineffective assistance claim fails and we need not address the other component. (*Id.* at p. 697.)

On review, we “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. [Citation.] Tactical errors are generally not deemed reversible, and counsel’s decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.” (*People v. Maury* (2003) 30 Cal.4th 342, 389.) “[D]efendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’ ” (*Strickland v. Washington, supra*, 466 U.S. at p. 689.)

Although the record does not disclose why counsel did not request a pinpoint instruction on third party culpability, we believe there is a logical and satisfactory explanation for counsel’s failure to request such an instruction. As our Supreme Court has held, such instructions “add little to the standard instruction on reasonable doubt.” (*People v. Hartsch* (2010) 49 Cal.4th 472, 504; *People v. Wright* (1988) 45 Cal.3d 1126, 1134.) The omission of such instructions “is not prejudicial because the reasonable doubt instructions give defendants ample opportunity to impress upon the jury that evidence of another party’s liability must be considered in weighing whether the prosecution has met its burden of proof.” (*Hartsch*, 49 Cal.4th at p. 504.)

Here, the jury was instructed that the prosecution was required to prove every element of the charged offenses and that defendant committed the crimes beyond a reasonable doubt. (CALCRIM Nos. 220, 315.) The jury also was instructed that it alone must decide the facts of the case, evaluate the testimony of each witness, weigh the evidence and evaluate conflicting evidence, and determine the weight to give evidence.

(CALCRIM Nos. 200, 226, 302 333, 358.) Thus, if any evidence presented at trial raised a reasonable doubt in the jurors' minds about whether defendant committed the acts alleged—including, implicitly, evidence that other people committed the acts—they had to find defendant not guilty. Defendant's proposed instruction on third party culpability would not have added anything of substance to the instructions given.

Because a separate instruction on third party culpability would have been duplicative of other instructions given, we conclude that defense counsel was not ineffective in failing to request a third party culpability instruction.

III

Cumulative Error

Defendant contends the cumulative nature of the errors and/or defense counsel's deficiencies were, in the aggregate, prejudicial and require reversal. Because we have found only harmless error on one issue, we reject this contention.

IV

Sentencing Error

In supplemental briefing, defendant contends the trial court imposed an unauthorized sentence by imposing the great bodily injury enhancement on his conviction for battery with serious bodily injury, insofar as great bodily injury is an element of the substantive offense. The People agree the sentence was unauthorized. In their reply brief, the People also contend the trial court must correct the presentence custody credits. Defendant argues this claim was forfeited.⁶

⁶ Although defendant argues this claim was “waived” by the failure to raise it in the trial court, waiver is the intentional relinquishment of a known right, whereas forfeiture is the failure to timely assert a right. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.) Thus, the claim that the People are precluded from raising the credits issue on appeal based on their failure to object in the trial court is a claim of forfeiture, not waiver.

The trial court sentenced defendant to an aggregate term of seven years in prison: two years for battery with serious bodily injury (count 2), with an additional consecutive five years for the great bodily injury enhancement, and two years for elder abuse (count 1), with an additional consecutive five years for the great bodily injury enhancement, stayed under section 654. Defendant contends, and the People correctly agree, that application of the enhancement to battery with serious bodily injury (count 2) is unauthorized.

Section 12022.7, subdivision (g) provides that the enhancement shall not be applied to any offense in which infliction of great bodily injury is an element of the offense. Analytically, serious bodily injury in section 243 is the same as great bodily injury in section 12022.7. (*People v. Hawkins* (1993) 15 Cal.App.4th 1373, 1375.) Since serious bodily injury is an element of the offense in section 243, the enhancement cannot attach to that count.

Because a defendant's aggregate prison term under the determinate sentencing law "cannot be viewed as a series of separate independent terms, but rather must be viewed as one prison term made up of interdependent components," "[t]he invalidity of some of those components necessarily infects the entire sentence." (*People v. Burns* (1984) 158 Cal.App.3d 1178, 1183.) Where, as here, "correction of a sentencing error may affect the trial court's discretionary decisions in determining an appropriate sentence, the remedy is to reverse and remand for resentencing." (*People v. Edwards* (2011) 195 Cal.App.4th 1051, 1060; *People v. Rodriguez* (2009) 47 Cal.4th 501, 509, 510.) When reconfiguring the sentence upon remand, the trial court may not impose a sentence that exceeds defendant's original sentence of seven years. (See *People v. Hanson* (2000) 23 Cal.4th 355, 357.)

The People's contention that the trial court must correct the presentence custody credits is moot given that the matter shall be remanded to the trial court for resentencing.

DISPOSITION

The sentence is vacated in its entirety and the matter is remanded to the trial court for resentencing. The court is directed to strike the great bodily injury enhancement from count 2 and to impose a new sentence consistent with this opinion. Upon resentencing, the clerk shall prepare a new abstract of judgment that conforms to the court's oral pronouncement of judgment at the resentencing hearing, and shall forward a certified copy of the abstract of judgment to the Department of Corrections and Rehabilitation.

KRAUSE, J.

We concur:

BUTZ, Acting P. J.

HOCH, J.